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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 572

SIMON L. LEVY, CHARLES B. LEVY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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Simon L. Levy and Charles B. Levy, petitioners herein, respectfully pray this Honorable Court that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals, entered in the above entitled cause on the 3rd day of November, 1943, affirming an order and judgment of the District Court of the United States for the Southern District of Indiana (R. 428).

A Petition for Rehearing and supporting brief were filed in the United States Circuit Court of Appeals for the Seventh Circuit, which petition was filed on the 12th day of November, 1943, (R. 456) and overruled by said Circuit Court of Appeals without opinion on the second day of December, 1943.

Summary of the Matters Involved.

1. The instant case was a prosecution against the petitioners and others, for the fraudulent use of the mails in the promotion of a merchandising project more fully disclosed in the record.

In the cross-examination of the petitioner, Simon L. Levy, on the trial which took place in December, 1942, the Court permitted, over the objection of petitioners' counsel the following:

> "Q. Mr. Levy, are you the same Simon Levy that was adjudged guilty in the United States District Court at Chicago on November 5, 1927, the charge being using the mails in furtherance of a scheme to defraud, and you were fined some three hundreds on each of twelve counts in the indictment?
>
> Mr. Royse: To which we object, because the evidence is incompetent, and for the further reason that it was nearly twenty years ago and has no bearing on this case whatsoever.
>
> The Court: I do not think it applies to this case, but he may answer.
>
> A. Yes.
>
> Q. State whether or not you are the same Simon Levy who was involved in the United States District Court in the year 1927.
>
> A. I was not convicted.
>
> Q. What do you mean, Mr. Levy?
>
> A. I mean that I was charged and a compromise was offered by the State's attorney who finally accepted a plea of *nolo contendre*, or some such name.

Q. Are you the same man?
A. Yes.
Q. But the court did enter a judgment that you were guilty of the offense charged and fined you three hundred dollars on each count and costs?
Mr. Royse: We object, as not being competent.
The Court: Sustained.
Mr. Pfister: That is all." (R. 280.)

2. In the light of the evidence, which will be more fully explained in the supporting brief, appended hereto, it was reversible error for the trial court to give to the jury the following charge, appearing at page 404 of the Record:

"* * * Evidence was introduced on behalf of the Government that the defendant, Simon L. Levy, was convicted of having violated the same statute with which he is charged with having violated in this case. He paid the penalty for that violation, and such evidence should be considered by you in this case for the sole purpose of determining the weight and credit to be given to his testimony, and as to his intent."

3. In the light of the record, which will be more fully explained in the supporting brief, the Court erred in giving to the jury the following charge, appearing on page 407 of the record:

"A person is presumed to intend the natural and probable consequences of his own voluntary act. Therefore, if you should find from the evidence beyond a 'reasonable doubt' that the natural and probable consequences of the acts of the defendants in this case, or any or either of them were to do the things condemned by the statute, and that such acts were done voluntarily by the defendants, then, as a matter of law, it may be presumed that the defendants intended to do those things."

Basis Upon Which It Is Contended That This Court Has Jurisdiction to Review the Judgment in Question.

It is contended that this Court has jurisdiction to review the judgment in question for each of the following reasons:

1. The decision of the Circuit Court of Appeals in upholding the cross-examination of Simon L. Levy as above set out, and in upholding the instructions above set forth, and failing to find prejudical error therein, is in conflict with the decisions of the same and other Circuit Courts of Appeal on the same matter, and in conflict with the decisions of the Supreme Court of the United States.

2. An injustice has been done the petitioners which deprived them of their liberty, in the giving of each of the instructions above mentioned, in the light of the record. It will be presumed that the errors contained in said cross-examination and in said instructions were influential factors in bringing about the verdict of guilty, and this presumption will be supported by arguments appearing in the brief in support hereof.

Reasons for Allowing the Writ.

The Writ of Certiorari should be granted in this case for the following reasons:

1. The cross-examination above referred to, being prejudicial and erroneous, and the failure of the Seventh Circuit Court of Appeals to find error therein, are in conflict with the previous decisions of the same Circuit Court of Appeals, as well as other Circuit Courts of Appeal and the Supreme Court of the United States.

2. The instructions of the trial court to the jury are set forth in full in the record. Among the instructions appear those above referred to, and the opinion of the Circuit

Court of Appeals holds the instructions to be as favorable to the petitioners as they were entitled to. Other Circuit Courts of Appeal, as well as the Supreme Court of the United States, have held otherwise in relation to similar or identical instructions, and the conflict resulting therefrom should be removed.

3. The liberty of citizens of the United States is involved in this case, and where such liberty is in jeopardy, or has been taken away, and a factor thereto has been the giving of prejudicially erroneous instructions by the trial court to the jury, it is within the purview of this court to intervene on a Writ of Certiorari to correct the injustice that has been done.

WHEREFORE your Petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket No. 8225, *Simon L. Levy and Charles B. Levy, appellants* v. *The United States of America, appellee*, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by the Court, and for such further relief as to this Court may seem proper.

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Of Counsel.

BRIEF.

Opinion of Court Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (138 Fed. (2nd) 429) appears in full in the record (R. 448). No opinion was rendered by the District Court.

Jurisdiction.

The jurisdiction of the Court is invoked under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925, Section 347, Title 28, U. S. C. A.

STATEMENT OF THE CASE.

This prosecution was brought in the District Court of the United States for the Southern District of Indiana, and the petitioners herein, with eight other individuals and two corporations, were charged with a fraudulent scheme and the use of the United States mails in its execution.

The indictment contained six counts, in five of which, in identical terms, the scheme was described, and in Count 6 was charged a conspiracy to commit the fraud alleged in the other five counts.

The jury returned a verdict of guilty against all defendants on all of the counts, but prior to the jury's retirement, each defendant had filed a motion for an instructed verdict. After the verdict had been returned, the Court sustained the motion as to six of the individuals, gave a nominal suspended sentence of one day to two of the other individuals, and a sentence of five years to the two petitioners herein.

That the case was one of grave doubt as to its merits, even in the mind of the Circuit Court of Appeals, is shown by the following quotation from the opinion of that Court:

> "We agree with the contention that much of the proof, even that offered by the Government, is as consistent with defendants' good faith as with their intent to devise a scheme to defraud. This is especially true when it is considered that defendants were entitled to engage in a reasonable amount of what is sometimes termed as 'puffing', or extolling the merits of their business and product." (R. 450.)

Under such circumstances, in the administration of justice, courts should, and do, consider with care the question of whether or not prejudicial errors entered into the trial of the case which may have influenced the jury in arriving

at its verdict, and where errors of this type are disclosed, it will be presumed that they did, in fact, have weight with the jury.

From an examination of the record it will appear that the Government sought to introduce evidence of a former indictment of Simon L. Levy, one of the petitioners herein, and a sentence thereon upon a plea of *nolo contendre*, and in the Court's charge to the jury it dealt with the force and effect of such evidence. It is true that the points with respect thereto were not saved by the trial attorneys of the petitioners, with the technical niceties that are laid down in the rules of practice, but they are specifically pointed out in the petition for rehearing before the Circuit Court of Appeals, the errors were plain, and it appears to us that the prejudice therein is so glaring as to require this Court to grant a writ of certiorari and reverse the judgment of conviction and order a new trial by reason thereof.

By the cross-examination of petitioner Simon L. Levy, over the objection of petitioners' counsel, as set forth in paragraph 1 of Summary of the Matters Involved in the above petition for the writ of certiorari herein, the jury was made aware of the fact that Simon Levy was adjudged guilty in November, 1927 in the United States District Court at Chicago on a charge of using the mails in furtherance of a scheme to defraud and was fined upon each of 12 counts in the indictment. The above quotation discloses that first the trial court permitted the fact of such judgment of conviction to be shown with a statement that he thought it did not apply to the case and then he expressly sustained an objection to the evidence of such judgment.

It is obvious that if the jury believed that Simon Levy had a criminal record, even though the conviction referred

to took place more than fifteen years before the trial and even though there was no evidence to show that Simon Levy since that date had not led an upright and respectable life, the jury, unless properly instructed, would be apt to find the *defendants-petitioners* guilty. This they might not have done had the fact of such judgment of conviction not been brought to their attention. In this connection it is most interesting to note that the jury not alone found the petitioners Simon L. Levy and Charles B. Levy guilty, but they found all of the defendants guilty. Yet, notwithstanding such verdict, as the opinion of the Circuit Court of Appeals shows, six of the individual defendants found guilty by the jury were acquitted on a motion for a directed verdict, the ruling on which had been reserved by the trial court.

While the evidence of such alleged former conviction of Simon Levy was not in any way connected up with the petitioner Charles B. Levy or any of the other defendants, nevertheless, since the defendants were all charged with being parties to the scheme or artifice to defraud and to a conspiracy to violate the mail fraud statute, if the evidence of such alleged former conviction was reversibly erroneous as to Simon Levy, it was equally so as to Charles B. Levy, petitioner herein.

The harmful character of the evidence of such alleged former conviction was increased by the manner in which the trial judge dealt with it in his charge to the jury.

We respectfully request the Court to consider that part of the trial court's charge to the jury appearing at page 404 of the transcript, reading as follows:

> "* * * Evidence was introduced on behalf of the Government that the defendant, Simon L. Levy, was convicted of having violated the same statute with which he is charged with having violated in this case. He paid the penalty for that violation, and such evi-

> dence should be considered by you in this case for the sole purpose of determining the weight and credit to be given to his testimony, and as to his intent."

We submit that the prejudice against all of the defendants created by the cross-examination of the petitioner Simon Levy with respect to his alleged former conviction on a plea of *nolo contendre* on November 5, 1927, was substantially increased by the erroneous charge to the jury above quoted. The trial court erroneously told the jury that such alleged former conviction could be considered by it for the purpose of determining the weight and credit to be given to the testimony of Simon Levy and as to his intent (Tr. 404, 417).

It seems to us that the error in the court's charge with reference to the alleged conviction is rendered more glaring by the fact, as shown on page 280 of the transcript, that the trial court sustained an objection to the question by the prosecuting attorney as to whether the United States District Court in 1927 entered a judgment against Simon Levy that he was guilty of the offense charged and fined three hundred dollars on each count.

The comment of the trial court in its charge to the jury above referred to, we respectfully submit, would have been unwarranted even if the court had not sustained the objection to the question of the prosecutor as above set forth. It is clear under the authorities that the plea of *nolo contendre* does not create an estoppel against the defendant, but merely constitutes an admission of guilt for the purposes of the particular case in which it is made. If this be so, then the finding of guilty on a plea of *nolo contendre* to a charge of a violation of the mail fraud statute cannot possibly be evidence on a later charge of a violation of the same statute where no connection whatever is shown between the alleged scheme to defraud involved in the judgment of conviction and that involved

in the case in which such judgment of conviction is offered for the purpose of showing the defendant's intent.

In the case of *Tucker* v. *United States,* 196 Fed. 260, (C. C. A. 7th) in discussing a plea of *nolo contendre,* said:

> "The plea is thus well characterized, under the definitions of Hawkins and Chitty, in *State* v. *La Rose,* 71 N. H. 435, 438, 52 Atl. 943, viz: 'The plea is in the nature of a compromise between the state and the defendant,—a matter not of right but of favor. Various reasons may exist why a defendant conscious of innocence may be willing to forego his right to make defense if he can be permitted to do so without acknowledging his guilt. Whether in a particular case he should be permitted to do so is for the court."

In *State* v. *La Rose, supra,* quoted from with approval by that Court in the *Tucker case,* the Court squarely held that a conviction on a plea of *nolo contendre* was not admissible in evidence in a later criminal case for any purpose.

In *Hudson* v. *United States,* 272 U. S. 451, at p. 455, the Supreme Court, in discussing such a plea, said:

> "Like the implied confession this plea does not create an estoppel, but like the plea of guilty, it is an admission of guilt *for the purposes of the case."* (Emphasis supplied.)

If the acceptance of a plea of *nolo contendre* and the imposition of a fine does not create an estoppel against the defendant, but merely constitutes an admission of guilt for the purposes of the particular case in which it is made, then it would seem clear that the so-called conviction based upon such plea may not be used for the purpose of affecting the credibility of the defendant or proving his intent, upon a criminal trial against him 15 years later, or at any other time. To the effect that it may not be so used, see Vol. 9 Cyclopedia of Federal Procedure (2nd Ed.) Sec. 4141, note 77.

In any event the lapse of time since the entry of the order in 1927, even if such order were treated the same as a general conviction on a plea of guilty or one of not guilty, would render it too remote as a matter of law to affect the credibility of Simon Levy or to establish his intent on the trial of the case now under review (70 Corpus Juris, Sec. 1057). This is especially true since there is no evidence whatever in the record, that Simon Levy since 1927 up to the date of the trial of the case under review had any other convictions against him or had not lived an upright and respectable life.

The greatest evil in the charge of the court as to the effect of the alleged conviction in 1927 of Simon Levy was his comment that the jury should consider it *as to his intent* on the present trial. Bearing in mind that the trial court had previously charged the jury that the business of the defendant upon its face was in fact legitimate (Tr. 415) and according to the charge to the jury the whole issue was as to the *intent* with which the business was conducted, it would seem grievous error for the trial court to instruct the jury that in arriving at the *intent* with which the defendant Simon Levy conducted the business which upon its face was legitimate, the jury *should consider an alleged conviction* on a wholly unrelated mail fraud charge that took place 15 years prior to the trial of the present case.

If that kind of evidence is held to be admissible, not merely for the purpose of affecting the credibility of the defendant, but also to establish his *intent*, then there is no hope whatever for a person who has once been convicted of violating a mail fraud statute that he can ever redeem himself in society. (See special concurring opinion of Mr. Justice Shaw joined in by Justices DeYoung and Farthing in *People* v. *Serriell*, 354 Ill. 182, at 189, and *People* v. *Willy*, 301 Ill. 307, at 391; 70 Corpus Juris 854, Sec. 1057.)

The trial court after the charge was over struck out the word conviction and substituted therefor the statement that Simon Levy was involved in a controversy in the Federal Court. Such change did not in any way remove or even reduce the prejudicial errors set forth above, resulting from the charge that evidence of that earlier court proceeding involving petitioner, Simon Levy, should be considered by the jury for the purpose of determining the weight and credit to be given to the testimony of Simon Levy and *as to his intent.*

To summarize the prejudicial errors resulting from this portion of the charge: (1) it was unsupported by the evidence since the trial court had sustained an objection thereto, (2) punishment imposed by the court upon a defendant pleading *nolo contendre* may not be shown in evidence in a later criminal case for any purpose, (3) even if an order imposing punishment based upon a plea of *nolo contendre* were admissible under proper circumstances to affect the credibility of the defendant testifying as a witness in a trial of a subsequent criminal indictment and to prove the specific intent which must be established as a part of the crime for which he is subsequently charged, the fact that this earlier court proceeding occurred 15 years previously, coupled with the absence of any showing that the defendant did not lead an entirely lawful and upright life in the interim, made the use thereof in this case prejudicially erroneous, and (4) even if an order imposing punishment based upon a plea of *nolo contendre* were admissible under proper circumstances to prove specific intent which must be established as a part of the crime for which he is subsequently charged, the charge in this case in that respect was, nevertheless, prejudicially erroneous since the record fails to disclose any relationship of any kind whatever between the charges against the petitioner, Simon Levy, in the indictment to which he pleaded *nolo contendre* in 1927 and in the indictment here-

in, other than the bare fact that both constituted charges of violations of the mail fraud act.

If we are correct in our contention that the court herein committed prejudicial error, in its charge as to the effect to be given to the sentence of Simon Levy on his plea of *nolo contendre* in 1927, then the convictions of both appellants are reversibly erroneous, since it is impossible to determine that the prejudice therefrom to Charles Levy was any different or less, so far as the jury was concerned, than the prejudice to Simon Levy. Moreover, Charles Levy, as a defendant, was entitled to the full benefit of the testimony of the witness, Simon Levy, unaffected by any erroneous charge respecting his credibility.

The Circuit Court, we respectfully submit, overlooked in its consideration of the appeal that there is another respect in which the trial court committed reversible error in its charge to the jury. The court in its charge to the jury said (Tr. 414-15):

> "The business in which the defendants were engaged may have been perfectly legitimate, and there is no charge in the indictment but that such business was legitimate. In fact, the Government does not contend that such business, upon its face, was not legitimate. The fact is that such business, upon its face, was legitimate. It is the contention of the Government, however, that it was the intention of the defendants to convert the money paid to them by the appointed distributors for such distributorship to their own use, without any intention upon their part, to carry out the contract entered into by and between them, and thus defraud such distributors out of the deposit thus made. This, in brief, constitutes the scheme charged in the indictment.
>
> "A business perfectly legitimate, and fair and honest, upon its face, may, nevertheless be used as a scheme to defraud, if it is the intention and the purpose of the person or persons so engaged to use such business as a scheme to defraud. It may be necessary, in order to deceive that the scheme, upon its face,

should appear to be fair and honest. Under the law, it makes no difference how seemingly fair and honest a scheme may be if the purpose of the scheme is to defraud, it is within the statute."

Previously the court had charged the jury as follows (Tr. 407):

"A person is presumed to intend the natural and probable consequences of his own voluntary act. Therefore, if you should find from the evidence beyond a 'reasonable doubt' that *the natural and probable consequences* of the acts of the defendants in this case, or any or either of them, were to do the things condemned by the statute, and that such acts were done voluntarily by the defendants, *then, as a matter of law,* it may be presumed that the defendants intended to do those things." (Italics supplied.)

As the above quoted charge taken from page 414-415 of the transcript discloses, the trial court believed and so charged the jury that the business in which the defendants were engaged was perfectly legitimate. Nevertheless the jury were told that such a legitimate business might be used as a scheme to defraud if it was the intention and purpose of the person or persons engaged in that business to use it as a scheme to defraud. Under the authorities a successful prosecution under the mail fraud statute requires proof of a specific intent. *Hibbard* v. *U. S.,* 172 Fed. 66.

The trial court gave to the jury in the cited case the same instruction which is quoted above from page 407 of the transcript. The 7th Circuit in the Hibbard case reversed the judgment of conviction on a charge of violating the mail fraud statute for the giving of such instruction. After the opinion was filed, the Government applied for a rehearing and in the opinion on such rehearing, in discussing the instruction, that Court said at page 73:

"Standing by itself, as an abstract proposition of law, the instruction is not erroneous. The error con-

sists in applying it to a case wherein, apart from the intent, the act is colorless; color being thereby imparted, not to the intent by the color of the act, as the law implies, but to the act itself by the color borrowed for the intent. In cases like this where the act itself is, apart from the intent, colorless, the color of the intent must be proven as anyo ther element of criminality is proven. The instruction as given (bearing in mind the case to which it was applied) though correct as an abstract proposition of law, tended to confuse the jury upon what, in this case, was the burden on the government, and thereby, in our judgment, prejudiced the plaintiff in error."

In the light of the holding in *Hibbard* v. *U. S.*, (the decision in which was rendered by the same Circuit Court of Appeals as rendered the decision here sought to be reviewed) the charge above set forth from page 407 of the transcript was reversibly erroneous.

We respectfully submit that the record on this review clearly discloses that the petitioners, Simon L. Levy and Charles B. Levy, did not have a fair and impartial trial and that serious and prejudicial error was committed in the respects referred to above.

As has been repeatedly held by the Federal Circuit Courts of Appeals, where life or liberty is involved the court may notice and correct a serious error plainly prejudicial, even though it was not called to the attention of the trial court or even where the error was not preserved for review by proper objection, exception or assignment. *Miller* v. *United States,* 120 Fed. (2) 968. In the Miller Case, the court said at page 972:

"Where life or liberty is involved, an appellate court may notice and correct a serious error plainly prejudicial, without it being called to the attention of the trial court. *Troutman* v. *United States,* 10 Cir. 100 F. 2d 628, 634, or even where the error was not preserved for review by proper objection, exception or assignment, *Strader* v. *United States,* 10 Cir., 72 F.

2d 589, 593; *Williams* v. *United States*, 10 Cir. 66 F. 2d 868; *Bogileno* v. *United States*, 10 Cir. 38 F. 2d 584; *Kelly* v. *United States*, 10 Cir. 76 F. 2d 847."

See all to the same effect:

Reynolds v. *United States*, 48 Fed. (2d) 762.
Hayes v. *United States*, 112 Fed. (2d) 676.
Meadows v. *United States*, 82 Fed. (2d) 881.
Benson v. *United States*, 112 Fed. (2d) 422. Certiorari denied, 61 Sup. Ct. 43, 311 U. S. 644.
Hannon v. *United States*, 99 Fed. (2d) 933.
Thomas v. *District of Columbia*, 90 Fed. (2d) 424.

Plain errors first called to the attention of the Circuit Court of Appeals in a petition for rehearing should be considered and passed upon by that Court.

Pierce v. *United States*, 255 U. S. 398.

See also *Sheridan* v. *U. S.*, 312 U. S. 654; *Hemphill* v. *U. S.*, 312 U. S. 658; and *Wiborg* v. *U. S.*, 163 U. S. 632, at 659.

We respectfully submit that the glaringly prejudicial harm suffered by these petitioners by reason of the conduct of their trial pointed out hereinabove will satisfy this Court as to the injustice done and the necessity for a new trial.

WHEREFORE we respectfully pray this Honorable Court to grant the petition for a Writ of Certiorari, and for all other further and proper relief.

Respectfully submitted,

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